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AUTHOR McKinley, Donald R.
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ABSTRACT

The suit of Peter Doe v. the San Francisco Unified School District resulted because the client was awarded a high school diploma attesting to the fact that he had satisfactorily completed all the requirements for high school graduation; however, the client was unable to read above a fifth-grade level or to adequately function in society. The court denied the complaint and stated that it was up to the legislature to change the present situation in the schools. Now all but one state has enacted or is considering enacting competency-based approaches to instruction. California's Hart Bill (AB 3406) as amended by AB 65 of 1977 is described. It mandates procedures which, if not followed, could leave districts open to malpractice suits. A model competency-based program developed by Merle S. McClung is also described. McClung was concerned with the possibilities for discrimination in a competency testing situation and designed a program that would assure that competency testing is fair to students. (Author/MLF)

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EDUCATIONAL MALPRACTICE--THE CASE OF PETER DOE ET AL

Presented by Donald R. McKinley

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Presented by Donald R. McKinley
California Chief Deputy Superintendent of Public Instruction
National Association of Secondary School Principals
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A little over 20 years ago the American romance with public education got a swift and powerful kick in the ribs when the Russians blasted Sputnik into orbit.

We have been in trouble ever since.

Until Sputnik, there were few who quarreled with what the schools were doing. While educators might quibble about fine points concerning curriculum or classroom practice, Americans knew that schools were good, and they supported them philosophically and with their tax money.

School stood for knowledge and reasonable authority, and what the teacher or administrator said carried weight. The youngster who created problems at school, found problems when he got home. Everyone knew that education was good and valuable, like motherhood and apple pie.

When Sputnik hit the skies, the public's confidence in its schools was shattered. Americans heard from many authorities just how important education had become.

The Air Force Chief of Staff told us:

"The security of our nation ... depends as much on the wisdom and skill of our engineers, scientists and technicians as it does upon the courage of our fighting men."

Education was that important.

And Franklin Murphy, Chancellor of the University of Kansas said:

"The message which this little ball carries to Americans, if they would but stop and listen, is that in the last one-half of the 20th century nothing is as important as the trained and educated mind."

If education was now so important, how come Ivan was better at it than Johnny?

That was a hard one to answer.

Criticism came hard and fast. We responded with a flood of innovations. By God, if the public wanted better schools, we'd come up with all kinds of new and different ideas.

And as Ralph Pisapia said recently, "When our environment criticized us for low quality schools, inadequate management, inadequate instruction, outmoded curricula, low-achieving students, discriminatory school practices and variations in school spending, we changed. We responded with MBO, MIS, Team Teaching, Departmentalization, Differentiated Staffing, School Consolidations, The Comprehensive High School, New Buildings, Strong Teacher Licensing Laws, Competency-Based Education, Teacher Centers, Compensatory Education, Head-Start, Follow Through, Project Developmental Continuity,

Gifted Programs, Advanced Placement, Bilingual Education, Alternative Schools, Mini-Schools, Special Schools, Equivalency Diplomas, Youth Projects, Community Schools, Elimination of Tracking and State Aid Equalization Systems ..."

It didn't help. We're still in trouble.

Of all the jargonese that has surfaced since Sputnik, the word with the most enduring quality, the one with the hardest shell that is probably going to be around the longest is ACCOUNTABILITY.

Our innovative flurries haven't convinced the public. Falling test scores, and a hostile press, which continually reminds our clients that all isn't as it should be, continue to squeeze ... the pressure per square inch is increasing.

Evaluation is becoming more important and is heavily relied upon. We tend to evaluate or try to evaluate the end result,

not necessarily how well it was done. We are not evaluating how well the person is actually applying method, systems or material.

A LONDON TIMES writer commented recently, "Americans over-emphasize evaluation. I'm sure God wasn't an American. If so, He would have said on the third day, 'Let's stop and evaluate where we are.' Then he would have been so disgusted with the project He would have dropped it."

Despite the LONDON TIMES, as far as education is concerned, evaluation and especially accountability are here to stay.

Educational malpractice is a relatively new word, but I'm afraid we may be hearing it more often.

Recently, at the University of Bridgeport, in Connecticut, a student sued because

the education course she took, in which she got an "A", wasn't worth the price of tuition.

And more recently, the Peter Doe v. the San Francisco Unified School District case may have set the stage for some interesting developments.

In 1974, the Youth Law Center in San Francisco sued the San Francisco Unified School District for \$500,000 on behalf of their client Peter Doe.

In the PLAINTIFF'S MEMORANDUM we read the following:

"This is an action to recover damages for the deprivation of what is unquestionably the most important and fundamental skill in our society--the ability to read and write. The plaintiff is a young man of average ability and intelligence who has spent some twelve years enrolled as a student

in the San Francisco public schools, and is the recipient of a high school diploma from that school district, attesting to the fact that he has satisfactorily completed all the requirements for high school graduation, but who, through negligence, acts of omission of the defendants, is functionally illiterate, unable to read above the fifth grade level, to comprehend or function in a meaningful way in this technological society. He seeks monetary compensation for the costs of supplementary education to acquire these skills, compensation for the loss of income resulting from the inability to read or write, and compensation for the mental anguish and suffering resulting from his diminished capacity to function."

The complaint was denied and the case went to the Court of Appeals which also turned down the complaint.

There were seven legal "causes of action" in the original complaint.

The first allegation was that district employees and administration were negligent in two ways: first, they failed to exercise reasonable and ordinary skill in teaching the plaintiff, and second, they negligently failed to diagnose the plaintiff's severe learning deficiencies and lack of academic skill. The result of the negligence was that the plaintiff failed to attain more than a fifth grade reading ability even though he graduated from public high school. This is the equivalent to a medical malpractice suit in which a doctor who undertakes to treat a patient is held to professional standards of care.

Justice Rattigan's opinion, with Justices P. J. Caldecott and J. Christian concurring, said basically that a verdict

for the plaintiff would expose schools to a multitude of unwarranted suits from any disgruntled clients of the public schools. The Appeals Court also made the point that no case or statute has ever held the government liable to any individual for failing to deliver on a promise of service to the public. Mandatory education was designed to protect society as a whole and was not intended to confer a specific benefit on particular individuals. The court also pointed out that any liability of a financial nature should be imposed, if at all, by the Legislature, rather than the courts.

In the second cause of action, the plaintiff argued, "Defendant school district, its agents and employees, falsely and fraudulently represented to plaintiff's mother and natural guardian that plaintiff was performing at or near grade level in

basic academic skills such as reading and writing...The representations were false. The charged defendants knew that they were false, or had no basis for believing them to be true. As a direct and proximate result of the intentional or neglect misrepresentation made..., plaintiff suffered the damages set forth herein."

Justice Rattigan ruled, "The second count nevertheless does not state a cause of action, and further declared that by statute, neither public employees nor public agencies are liable for injuries caused by misrepresentation of employees, whether the misrepresentation is negligent or intentional.

The other allegations were as follows:

That the district failed to perform their duty under Title 5, Section 10759 of the Education Code, to keep parents advised of the progress of their children;

That the district failed to discharge its duty under Section 8573 of the Code to

adopt standards for graduation equal to or higher than those set by the State Board regulations;

That the governing board failed to discharge its duty under Sections 1053 and 8002 to visit each school in the district, evaluate its educational program, and make such revisions as it deemed necessary;

That the district failed to discharge its duty under Section 8505 to adopt a course of study which meets the needs of the pupils for which it is prescribed;

And that the California Constitution, Article IX, Section 1 and the Education Code impose upon districts the obligation to provide each child with adequate instruction in the basic skills of reading and writing.

All of these charges were dismissed by the Appeals Court on the same basis as the first allegation, namely, that no case or statute has ever held the government liable to any individual for failing to deliver on a promise of service to the

public. And any liability of this financial magnitude should be imposed, if at all, by the Legislature rather than the courts.

Since this important decision, interesting things have happened.

For example, when the Appeals Court stated that it was up to the Legislature to change the present situation, it probably didn't realize just how quickly legislatures across the country were ready to react to public dissatisfaction with the quality of results. Now all but one state has enacted, or is considering enacting competency based approaches to instruction.

California's Hart Bill (AB 3408) as amended by AB 65 of 1977, mandates procedures which, if not followed, could leave districts open to malpractice suits.

For example:

- Each governing board of a high school district or a unified school district maintaining junior, senior, and four-year high

schools must adopt its own standards of proficiency by June, 1978, in the basic skills, including, but not limited to, reading comprehension, writing, and computation.

● Each governing board of an elementary school district or unified school district must adopt its own standards of proficiency by June 1979, in the basic skills listed above.

● High school districts and the elementary school districts within the high school districts must coordinate their work in developing proficiency standards, and they must make the standards well known to parents, students, teachers, and the community as a whole. Representatives of the high school and elementary school districts are required to meet with one another to discuss how this may be accomplished.

● In developing proficiency standards, the governing boards must involve parents,

school administrators, teachers, and counselors in the process; and students must also be involved in the development of standards for the high schools.

● Beginning in 1978-79 for high schools, and in 1979-80 for elementary schools, the progress of students toward meeting proficiency standards shall be assessed at least once in grades four through six, once in grades seven through nine, and twice in grades ten through eleven. Once a student has met the standards up to prescribed levels for graduation from high school, his or her progress need not be reassessed.

● The school principal or the principal's designee shall hold a conference with each student who does not demonstrate sufficient progress toward mastery of basic skills and a meeting must also be held with the student's parent or guardian to discuss the assessment results and recommended actions to further the student's progress.

● Districts shall provide appropriate instruction in basic skills for those students who do not demonstrate sufficient progress toward mastery of basic skills.

● After June, 1980, any student who has not met the locally adopted standards of proficiency shall not receive a diploma of graduation from high school.

● By January 1, 1979, governing boards, with the active involvement of parents, administrators, teachers, and students shall adopt alternative means for pupils to complete the prescribed course of study mandated in existing law. This requirement is not directly related to the new requirements for proficiency standards in the three basic skill areas; but it is nonetheless, an important requirement that districts must address.

While there may not have been a recognized standard of education at the time of Peter Doe v. San Francisco Unified

School District, there certainly is one now in California. Which leads us to the big question. Can school districts now be accountable if students do not meet prescribed standards? The answer to that specific question is still unclear. But what is clear is that the Hart Bill requires due process.

Clearly, the Hart Bill now makes the likelihood of successful malpractice litigation more probable. For there is now concrete action which must be taken. The teacher or administrator who is aware that a student is not doing as well academically as the standards prescribe, and does nothing about it, is inviting trouble.

Not everyone is in favor of proficiency oriented instruction and assessment. The National Council of Teachers of English recently came out against it stating, "All legislatively mandated competency-based testing should be halted until it is

determined to be socially and educationally beneficial."

And Merle S. McClung, Attorney for the Center for Law and Education, points out the possibilities for discrimination in a competency testing situation. For example, in Palm Beach County, Florida, when a test was given to all students based on a 70 percent pass-fail cutoff recommended by the Superintendent of Schools, 72 percent of the county's black students would have failed, but only 8.3 percent of the white students would not have been successful.

Another question raised is the issue of fairness for all students without an adequate phase-in period. Two or three years notice seems inadequate for a test which purports to measure 12 years of cumulative learning. Such a brief notice may constitute a due process violation.

The Attorney has described a model competency-based program which is worth examining.

"A model program would also include the following provisions designed to assure that competency testing is fair to students. First and most important, the test should not measure what the school never taught. If, for example, the decision is to test for ability to apply basic skills in life-role situations, satisfactory performance on the test should not be a prerequisite to a high school diploma or grade promotion until the school's curriculum and instruction have been sufficiently matched with these objectives.

"Second, any functional competency test, and the curriculum on which the test is based, should reflect all aspects of our pluralistic society--or at least the extent of diversity reflected in the student population...

"Third, a lengthy phase-in period should be incorporated not only to allow for necessary curricular and instructional

changes, but also to give students adequate notice that failure to learn during this period can have severe consequences. Depending on the program, this might mean phase-in notice starting as early as the first grade.

"Fourth, a model program would provide for multiple learning, evaluation, and remedial opportunities. Students who will have difficulty passing the test should be identified by pre-tests and given sufficient instruction and/or remediation to help them pass the test. Provision should be made to insure that students who do not pass the test are not tracked in all courses just because remedial instruction is necessary. The program should also provide further remedial education and test opportunities at any point after leaving school for those students with sufficient motivation to try again to pass the test at any later point in their lives.

"Finally, since learning is a two-way street, a model program should provide for students and educators to share responsibility for performance rather than placing the full burden on the students. For example, if passing a competency test is one criterion for a student's earning a high school diploma, a teacher's success in helping students pass the competency tests should be one criterion in the various forms of teacher evaluation (for example, tenure decisions). Such evaluation is feasible if students are tested at the beginning and end of each year in each course. Furthermore, administrators should be responsible for implementing the necessary changes in school practices, and the public should be responsible for financing such changes. Developing a workable model of shared responsibility will obviously be more difficult than placing the entire burden on students, but it will also be fairer."

While the threat of litigation may be frightening to some, the Hart Bill offers some balance between student responsibility and professional responsibility.

If our professionals will meet the challenge of due process, then the student can be assured of the following:

- 1) The standards for graduation will be clearly identified.
- 2) Tests to identify deficiencies will be given as early as grades 5 or 6.
- 3) Each classroom teacher is responsible to provide an individual program specifically designed to help the student master the proficiency standards until he or she masters them.

We all know that due process can be achieved by just going through the steps. To assure that no teacher has to fear the potential of successful litigation, I would

urge that a vigorous program evaluation procedure be implemented to do two things:

- 1) Be sure that the instruction matches the proficiency standards, and
- 2) That the teaching process is being reasonably well provided to each student affected.

I would be especially concerned that in the case of NES/LES students, the instruction is being provided in a language the student can understand.

I believe that this new wave of back-to-basic education and competency-based programs and evaluation will be with us for a long time. It puts pressure on educators at all levels to perform and to act in such a way that there are no grounds for challenges or educational malpractice suits.

But it also opens new opportunities to improve the product we offer and to win good will and support from the people we serve.